

**United States Court of Appeals**  
**FOR THE EIGHTH CIRCUIT**

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No. 03-2483

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United States of America,

Appellee,

v.

Alvin Ronald Allery, Jr.,

Appellant.

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Appeal from the United States  
District Court for the District  
of South Dakota.

[UNPUBLISHED]

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Submitted: March 4, 2004

Filed: March 8, 2004

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Before McMILLIAN, FAGG, and BOWMAN, Circuit Judges.

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PER CURIAM.

Alvin Ronald Allery, Jr., challenges the sentence imposed by the district court<sup>\*</sup> at resentencing following our remand in United States v. Allery, 50 Fed. Appx. 795, 797 (8th Cir. 2002) (unpublished per curiam), for resentencing “within a Guidelines range of 63-78 months.” On remand, Allery moved the district court to consider the victim’s conduct as grounds for a downward departure, and to consider Allery’s post-sentencing rehabilitative efforts and the victim’s conduct when determining at what

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<sup>\*</sup>The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

point within the Guidelines range to impose sentence. The district court resentenced Allery to 76 months imprisonment and 3 years supervised release. Allery's counsel has filed a brief under Anders v. California, 386 U.S. 738 (1967), raising a challenge to the court's denial of Allery's motion for departure. Allery has filed a pro se brief raising claims of ineffective assistance of trial counsel and appellate counsel.

We find the district court properly rejected the motion for a downward departure given the scope of our remand, see United States v. Prestemon, 953 F.2d 1089, 1090 (8th Cir. 1992), and the ineffective-assistance claims are not properly before us, see Massaro v. United States, 538 U.S. 500, 123 S. Ct. 1690, 1696 (2003); United States v. Hughes, 330 F.3d 1068, 1069 (8th Cir. 2003). We also find no nonfrivolous issues after having performed our independent review under Penson v. Ohio, 488 U.S. 75, 80 (1988). Accordingly, we affirm.

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